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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 168

FEDERAL BROADCASTING SYSTEM, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND WBBF, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25-28) is reported at 266 F.2d 922. The decision and order of the Federal Communications Commission is reported at 24 F.C.C. 179.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1959. The petition for certiorari was

filed on July 1, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commission properly rejected petitioner's protest against the grant of license renewal of radio station WBBF on the grounds that WBBF had not engaged in conduct contrary to the public interest or otherwise demonstrated unfitness to be a broadcast licensee by refusing to grant petitioner's request for blanket authorization to rebroadcast all WBBF programs in which WBBF had no proprietary interest.

STATUTE INVOLVED

The pertinent provision of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C., Supp. V, 151, *et seq.*), in addition to those set forth in the Petition, pp. 3-4, is as follows:

> Sec. 309(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) of this section, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made.

or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. * * *

STATEMENT

On May 20, 1954, the Federal Communications Commission granted the application of WBBF, Inc. for renewal of its standard broadcast license in Rochester, New York (R. 7). Petitioner filed a protest against this action pursuant to Section 309(c) of the Communications Act, alleging that renewal was contrary to the public interest for two reasons: (1) petitioner, who operated standard broadcast Station WSAY in Rochester, had requested blanket permission from WBBF to rebroadcast any of its programs for which a network or sponsor had paid production costs, and WBBF had refused such permission; and (2) WBBF, Inc., which also owned Station WGVA in Geneva, New York, was offering advertisers a lower, combination rate if they would buy time on both stations, thus allegedly competing unfairly with petitioner's station and impairing its ability to operate in the

public interest (R. 9). The Commission, on July 16, 1954, dismissed the protest on the ground that the protest did not meet the statutory requirement of Section 309(c) of the Communications Act, in that facts were not specified with particularity showing why WBBF's license should not be renewed (R. 9-10).

The court of appeals reversed, holding that petitioner had met the statutory test as to particularity. *Federal Broadcasting System* v. *Federal Communications Commission*, 231 F. 2d 246 (C.A.D.C.). Upon remand, the Commission, in conformity with the appended provisions of Section 309(c), ordered oral argument on the question whether, if the facts alleged in the protest were to be proven, grounds would be presented for setting aside the grant of WBBF's renewal application (R. 1-7). Thereafter, on March 14, 1958, the Commission issued its decision rejecting petitioner's protest on the merits and affirming the renewal of WBBF's license (R. 7-26).

The facts, with respect to the rebroadcasting issue, were that petitioner had requested permission "to rebroadcast" WBBF's programs when they were "programs of a sponsor, or sponsors, which desire, or may desire their programs rebroadcast by Station WSAY" (R. 18). Such "blanket permission", petitioner had informed WBBF, was necessary because it "intend[ed] to negotiate with all of [the sponsors of such programs] for the rebroadcasting of their programs, and we must be able to assure them that their programs can be rebroadcast as far as your

station is concerned, before we can proceed further in our negotiations" (R. 19, n. 11). WBBF had rejected petitioner's request stating (R. 18):

> In view of the blanket, unqualified, unspecific, and unlimited nature of your request, and the absence of such pertinent information as the particular programs which you wish to rebroadcast, the time when you wish to carry them, the terms and arrangements which you are willing to offer, etc., we cannot determine that the public interest would be served by granting your request.

The Commission, in concluding that WBBF's refusal to grant such blanket permission for rebroadcast privileges was not grounds for denying renewal of its license, referred first (R. 20-21), "as background," to prior rule-making proceedings in 1952 concerning rebroadcasting (*Report on Amendment of Rebroadcasting Rules*, 17 F.R. 4711), in which it had construed the term "originating station", appearing in Section 325(a) of the Communications Act, as referring solely to the stations whose signals are physically intercepted and retransmitted, irrespective of the source or ownership of the program material involved (17 F.R. at 4712). It also referred to a subsequent order in this proceeding in which the Commission had set forth in detail the circumstances under which refusal by such an originating station of permission to rebroadcast its signals might be an abuse of its power under Section 325(a), and thus raise public interest questions (17 F.R. 10309-10).

Turning to the circumstances of the instant case,

alleged to show an abuse of power by WBBF (R. 21-23), the Commission, noting that WBBF and the petitioner serve the same area in and around Rochester, found that WBBF was justified in denying the blanket authorization petitioner requested in the absence of (1) more specificity as to the exact circumstances under which particular programs would be rebroadcast, or (2) a showing that WBBF "acted in concert with another station or other interests in refusing" the request (R. 21-23).[1] Rejecting petitioner's arguments on other matters not here pertinent, the Commission concluded that the protest presented no grounds for setting aside WBBF's license renewal and affirmed the grant (R. 26).

The court of appeals unanimously affirmed the action of the Commission (Pet. App. 25-28), holding (Pet. App. 27) that the Commission correctly rejected the rebroadcast portion of petitioner's protest "because the request for rebroadcast authority was patently unreasonable in scope". The court did not reach the question of the validity of the Commission's interpretation of the rebroadcast provisions of Section 325(a), as expressed in the 1952 rule-

[1] It also stated that requiring the honoring of blanket rebroadcast requests would be inconsistent with the Commission's previous interpretations of the meaning of Section 325(a), and a refusal of rebroadcasting privileges would raise questions as to a station's qualifications only where the request is to rebroadcast a program "having such public service aspects as to make its wide dissemination to the public clearly desirable" and the refusal is without reason or based on unreasonable grounds (R. 23). The court of appeals found it unnecessary to pass upon the validity of these alternative grounds.

making proceedings to amend the rebroadcast rules (*ibid.*).

ARGUMENT

The petition for certiorari presents no question of general importance warranting review.

Petitioner's principal contention, that the Commission has misconstrued the term "originating station" in Section 325(a) of the Communications Act (Pet. 9-17), is not properly presented by this case. The court below, affirming the Commission determination that WBBF's refusal of blanket rebroadcast rights to petitioner did not "constitute sufficient grounds for setting aside WBBF's license renewal", found it unnecessary to pass on the validity of the 1952 Commission rule-making proceedings in which the Commission had interpreted the term "originating station" (Pet. App. 27, n. 6). The court decided that the request for rebroadcast authority which petitioner made upon WBBF was "patently unreasonable", and that the Commission was therefore "correct" in finding WBBF "justified in refusing to grant such authority" in the absence of "more specificity" as to the details of the proposed rebroadcasts, or any showing WBBF had acted in concert with any other party in refusing the request (Pet. App. 27).

Petitioner urges that if, as it contends, WBBF was not the "originating station" of the programs in issue, it would have no power under Section 325 (a) to deny rebroadcast authorization, as it did here. Therefore, it is argued, the proper construction of the statute was necessarily before the court of ap-

peals. However, assuming *arguendo* that the Commission's construction of "originating station" was erroneous, it would not follow that its decision to renew the WBBF license would have to be set aside, for no question is raised as to WBBF's qualifications to be a licensee merely because it acted as an originating station, in accordance with the settled rulings of the Commission, and passed upon requests for rebroadcast permission made to it by the petitioner.[2] If petitioner believes, contrary to the position of the Commission, that rebroadcast permission is not required where a station has no ownership interest in the program material transmitted, it is free to bypass WBBF altogether and deal directly with the network or program ponsor. And if the outstanding Commission determination stands in the way of such negotiations, petitioner may be in a position to seek a declaratory ruling as to its rights in the courts, presumably after first seeking such a ruling from the Commission. See *The Caples Company* v. *United States*, 243 F. 2d 232 (C.A.D.C.). But it cannot challenge WBBF's qualifications to be a licensee through a collateral attack upon the Commission's rules under which WBBF operated.

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[2] Nothing in the record before the Commission indicates WBBF did, or threatened to do, anything other than respond to a request petitioner made to it. WBBF is not alleged to have brought pressure upon the sponsors or network to have them refrain from authorizing petitioner to rebroadcast the programs in issue or to have threatened petitioner with any action should it rebroadcast their programs without securing WBBF's permission.

Petitioner's subsidiary challenge (Pet. 17-22) to the specific Commission finding that its blanket request for rebroadcast rights was deficient consists, to a large degree, of an attack upon the criteria announced by the Commission in its 1952 rule-making proceedings for determining whether refusal of a particular request for rebroadcast privileges is unreasonable (see Pet. 18-21). The court below, however, did not pass upon the propriety of the criteria in affirming the Commission's action here. Nor did the Commission itself purport to apply these criteria in ruling upon WBBF's conduct. Instead, it concluded (R. 22) that WBBF's refusal to grant the sweeping rebroadcast permission petitioner sought was justified because of the lack of pertinent information in petitioner's blanket request upon which a proper determination by the station as to whether permission should be granted or denied could have been based. This determination was clearly within the Commission's authority.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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